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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIANA CALVILLO,

Defendant and Appellant.

H042770

(Santa Clara County

Super. Ct. No. C1479064)

I. INTRODUCTION

Defendant Juliana Calvillo pleaded no contest to second degree burglary (Pen. Code, §§ 459, 460, subd. (b))¹ and was placed on probation. Defendant thereafter filed a petition for resentencing pursuant to section 1170.18, which was enacted as part of Proposition 47, seeking to have her felony conviction resentenced to a misdemeanor. The trial court found defendant ineligible for resentencing and denied her petition.

On appeal, defendant contends that the trial court erred in denying her petition, and that the court should have resentenced her to misdemeanor shoplifting or misdemeanor forgery pursuant to Proposition 47.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

We determine that defendant failed to show that the value of the relevant property did not exceed \$950, which is a requirement in order to be resentenced to misdemeanor shoplifting or misdemeanor forgery. Accordingly, we will affirm the trial court's order.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2014, defendant was charged by complaint with second degree burglary (§§ 459, 460, subd. (b); count 1), check forgery (§ 470, subd. (a); count 2), and possession of a completed check with intent to defraud (§ 475, subd. (a); count 3). Regarding the burglary count, the complaint alleged that defendant entered a Safeway with the intent to commit theft on or about May 27, 2013. Regarding the check counts, the complaint alleged that defendant had a forged check in the amount of \$119.65 on or about May 27, 2013. The complaint also alleged that she had served two prior prison terms (§ 667.5, subd. (b)).

Defendant subsequently executed an advisement of rights, waiver, and plea form. She pleaded no contest to second degree burglary (§§ 459, 460, subd. (b); count 1) in the instant case and pleaded no contest in two other cases, with the understanding that she would receive probation. After defendant entered her pleas, the prosecutor and defense counsel "stipulate[d] that there's a factual basis for the felony pleas." The court ordered the preparation of a waived referral memorandum by the probation department.

At the sentencing hearing, the trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions. The remaining counts were dismissed.

On July 10, 2015, the parties filed a single document containing a waiver, stipulation, and petition for resentencing under section 1170.18. The parties waived any right to have the petition for resentencing decided by the original sentencing court. The parties also stipulated that the felony offense in count 1 (§§ 459, 460, subd. (b)) would have been a misdemeanor, and that defendant did not have any specified prior convictions. The parties further stipulated that defendant was currently on probation,

did not pose an unreasonable risk to public safety, and was eligible to be resentenced under section 1170.18, subdivision (b).

On August 4, 2015, a hearing was held on the petition for resentencing by a different judge than the one who had taken defendant's no contest plea and who had presided over the original sentencing hearing. The prosecutor explained her position regarding the petition for resentencing as follows: "The People withdrew their stipulation, Your Honor, and we objected on the grounds that the defendant in this matter, while charged with [burglary] under Penal Code [s]ection 459, actually paid for the items with the forged check which makes it forgery." Defense counsel did not make any substantive argument in support of the petition for resentencing. The trial court found defendant ineligible for resentencing and denied her petition. The court explained: "Because the entry was made not with the intent to commit a larceny and because the crime itself does not commit [sic] a shoplifting as it is clear in this court's view that the voters intended based on the ballot statement, the description of the offense and its reference to shoplifting throughout, that this particular offense does not constitute a violation of Penal Code [s]ection 459.5" (shoplifting).

III. DISCUSSION

On November 4, 2014, the voters enacted Proposition 47, which reclassified certain felony drug and theft related offenses as misdemeanors and enacted a new statutory provision, section 1170.18, whereby a person serving a felony sentence for the reclassified offenses may petition for a recall of his or her sentence. (§ 1170.18, subd. (a); *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308.)

Section 1170.18 applies to "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense." (§ 1170.18, subd. (a).) Under section 1170.18, subdivision (a), such a person "may petition for a recall of sentence before the trial court

that entered the judgment of conviction in his or her case to request resentencing in accordance with [specified sections] of the Health and Safety Code, or Section 459.5, [or] 473 . . . of the Penal Code, as those sections have been amended or added by this act.”

Section 1170.18, subdivision (b) specifies the procedure for a trial court to follow “[u]pon receiving a petition under subdivision (a).” The court “shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to [specified sections] of the Health and Safety Code, or Section 459.5, [or] 473 . . . of the Penal Code, those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).)

In this case, defendant was convicted of second degree burglary, a felony, based on allegations in the complaint that she entered Safeway with the intent to commit theft. Section 459 defines the crime of burglary as follows: “Every person who enters any . . . shop, warehouse, store, . . . or other building, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.”

Relevant here, the theft related offenses that may be resentenced as misdemeanors under Proposition 47 include shoplifting with a value of \$950 or less (§ 459.5, subd. (a)) and forgery of a document with a value of \$950 or less (§ 473, subd. (b)). (§ 1170.18, subds. (a) & (b).)

Regarding shoplifting, section 459.5 states: “(a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a

person with one or more prior [specified] convictions . . . may be punished pursuant to subdivision (h) of Section 1170. [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.”

Regarding forgery, section 473 states: “any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950), shall be punishable by imprisonment in a county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior [specified] convictions” (*Id.*, subd. (b).)

According to defendant, the trial court denied her resentencing petition on the ground that her conviction for second degree burglary did not qualify for resentencing, because she used a forged check to fraudulently obtain property, rather than merely leaving the store with property that had not been purchased. Defendant contends that the trial court’s denial of her resentencing petition was erroneous for three reasons. First, defendant contends that the court erred because she was in fact convicted of entering a commercial establishment with the intent to commit theft, which is shoplifting as defined in section 459.5, and the court improperly looked beyond the record of conviction to deny relief. Second, defendant contends that even considering her actual conduct of using a forged check to fraudulently obtain property, such conduct is larceny by trick, which is defined as theft in the Penal Code. Such conduct therefore constituted shoplifting within the meaning of section 459.5. Third, defendant contends that if her crime was forgery as the prosecution argued below, she was entitled to resentencing because forgery (§ 473) is among the crimes reduced to a misdemeanor under Proposition 47.

In response, the Attorney General first contends that defendant failed to present any facts in the trial court to support resentencing, including that the value of the property

was \$950 or less (see §§ 459.5, subd. (a), 473, subd. (b)). Because she failed to meet her burden of proof, the Attorney General argues that the trial court's order denying the resentencing petition should be affirmed. Second, shoplifting requires an intent to commit larceny. The Attorney General contends that there were no facts showing that defendant committed larceny, which requires a taking without the property owner's consent, as contrasted with a consensual taking based on a false representation about the validity of a check. Third, the Attorney General contends that defendant may not have her second degree burglary conviction reduced to misdemeanor forgery because the prosecutor's argument could not change the statute under which she was convicted.

The issue of whether an intent to commit "larceny" under the shoplifting statute (§ 459.5, subd. (a)) includes theft by false pretenses, such as when a defendant uses a forged check, has divided the appellate courts and is an issue currently pending before the California Supreme Court.² We need not reach the issue in this case because, even if defendant's argument on this issue has merit, she has failed to establish that the value of the property was \$950 or less, which is a requirement for resentencing as misdemeanor shoplifting or misdemeanor forgery. (§§ 459.5, subd. (a), 473, subd. (b), 1170.18, subds. (a) & (b).)

A trial court's order or judgment "is presumed to be correct," and "the appealing party must affirmatively demonstrate error on the face of the record. [Citations.]"

² In one case, an appellate court concluded that an intent to commit larceny under the shoplifting statute does not include the intent to use forged checks. (*People v. Gonzales* (2015) 242 Cal.App.4th 35 [Fourth App. Dist., Div. One], review granted Feb. 17, 2016, S231171.) In other cases, appellate courts have concluded that an intent to commit larceny within the meaning of the shoplifting statute includes an intent to commit theft by false pretenses, such as by the use of a forged check. (*People v. Vargas* (2016) 243 Cal.App.4th 1416 [Second App. Dist., Div. Eight], review granted Mar. 30, 2016, S232673; *People v. Triplett* (2016) 244 Cal.App.4th 824 [Third App. Dist.], review granted Apr. 27, 2016, S233172; *People v. Root* (2016) 245 Cal.App.4th 353 [Fourth App. Dist., Div. One], review granted May 11, 2016, S233546.)

(*People v. Davis* (1996) 50 Cal.App.4th 168, 172; accord, *People v. Garza* (2005) 35 Cal.4th 866, 881.)

A defendant who petitions “for resentencing under Proposition 47 must establish his or her eligibility for such resentencing.” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 (*Sherow*).) If the crime under consideration is a theft offense under section 459.5 (shoplifting) or section 473 (forgery), the defendant “ ‘will have the . . . burden of proving the value of the property did not exceed \$950.’ [Citation.]” (*Sherow, supra*, at p. 879.) The defendant petitioning for resentencing has the “initial burden of proof” to “establish the facts upon which his or her eligibility is based.” (*Id.* at p. 880.)

If the defendant fails to meet his or her burden of proof, the trial court’s order denying the petition must be affirmed, even if the trial court expressed a different reason for denying the petition. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 139.) “[O]n appeal we are concerned with the correctness of the superior court’s determination, not the correctness of its reasoning. [Citation.] ‘ “[W]e may affirm a trial court judgment on any [correct] basis presented by the record whether or not relied upon by the trial court. [Citation.]” [Citation.]’ [Citation.]” (*Ibid.*)

In this case, defendant failed to prove that the value of the property did not exceed \$950. Although the parties initially stipulated in connection with the petition for resentencing that defendant was eligible for resentencing, the prosecutor had *withdrawn* that stipulation by the time of the hearing on the petition. The record on appeal does not reflect that defendant presented any other information about the value of the property in connection with her petition for resentencing.

On appeal, defendant contends that the prosecutor withdrew the stipulation “solely to contest whether [defendant’s] conviction qualified for resentencing when she used a forged check,” and that the prosecutor otherwise left intact a stipulation that the property defendant intended to take was valued at less than \$950. We do not agree with defendant’s characterization of the record. The prosecutor clearly stated that the

stipulation had been withdrawn. Although the prosecutor thereafter stated the basis for the prosecution's objection to the petition for resentencing, the prosecutor never indicated that the withdrawal of the stipulation was limited in scope.

Defendant next contends that, according to the complaint, the forged check she used was "well below \$950." She argues that the prosecutor at the resentencing hearing must therefore have "clearly agreed" with defendant that the property at issue was below \$950. We do not find defendant's argument persuasive. The allegations concerning the value of a check were contained in the two counts regarding forged checks that were ultimately dismissed. The burglary count, to which defendant pleaded no contest, simply alleged that defendant entered a Safeway with the intent to commit theft. There was no allegation in the burglary count about the value of any property. It is also not clear from the complaint or anything else in the record that the burglary count was based solely on the same alleged acts underlying the forged check counts. At the hearing on the resentencing petition, neither party discussed the issue of the value of any property. The record on appeal does not otherwise contain any information about the value of any property. Under the circumstances, we find unpersuasive defendant's argument that the prosecutor "clearly agreed" that all the property defendant intended to steal was valued at \$950 or less.

In sum, because defendant failed to meet her burden of proving that the value of the relevant property did not exceed \$950, the order denying her petition for resentencing must be affirmed.

IV. DISPOSITION

The August 4, 2015 order is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.